Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Sign Removal Order issued to The Lamar Company, LLC, d/b/a Lamar Advertising of Janesville (OASIS No. 14598)	Case No. DOT-16-0012-R
In the Matter of the Sign Removal Order Issued by the Department of Transportation to The Lamar Company, LLC, d/b/a Lamar Advertising of Janesville, for a Sign Located Along I-39, in Rock County (OASIS No. 14410)	Case No. DOT-16-0015-R

FINAL DECISION ON REMAND

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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PROCEDURAL HISTORY

On May 27, 2016, the Wisconsin Department of Transportation (Department) issued a sign removal order (SRO) to the Lamar Company, LLC, d/b/a Lamar Advertising of Janesville (Lamar) for an outdoor advertising sign (OASIS No. 14598) located along I-39 in Dane County. On June 23, 2016, Lamar requested a hearing to review the SRO. That matter was assigned docket number DOT-16-0012. On June 22, 2016, the Department issued a sign removal order to Lamar for another outdoor advertising sign (OASIS No. 14410) located along I-39 in Rock County. On July 11, 2016, Lamar requested a hearing to review the second SRO, which was assigned docket number DOT-16-0015. The two matters were combined for hearing purposes. On August 16, 2016, the Department issued an amended SRO for the sign that is the subject of docket number DOT-16-0012. The amended SRO added as another ground for the SRO that the subject sign has displayed messages that are in violation of restrictions in the federal Bonus Act. On June 1, 2020, the parties filed a stipulation in which the Department withdrew the alleged violation of the Bonus Act for the sign that is the subject of docket number DOT-16-0012 and abandoned any similar allegation for the sign that is the subject of docket number DOT-16-0015.

On June 3, 2020, Lamar filed a Motion to Dismiss the respective SROs. Based upon the parties' written briefs, on September 15, 2020, the previously assigned administrative law judge issued a Proposed Decision reversing the Departments SROs. Following receipt of the parties' objections, the Administrator for the Division of Hearings and Appeals (DHA) issued a Final Decision on October 15, 2020 adopting the findings and conclusions contained in the September 15, 2020 Proposed Decision. The Department requested a rehearing on November 4, 2020, which was denied on November 23, 2020. The Department then filed a petition for review with the Dane County Circuit Court on December 14, 2020 (Dane Co. Circuit Court Case No. 20-CV-2596). On July 20, 2021 the circuit court issued a Decision and Order Remanding the matter to the DHA for further proceedings. Specifically, the circuit court ordered that the Department shall be allowed to submit evidence of a "substantial change" under Wis. Stat. § 84.30(5)(br)1(f) prior to issuance of a determination in the matters.

On remand the matters were reassigned to Administrative Law Judge (ALJ) Kristin Fredrick. A scheduling conference was conducted on August 25, 2021 at which time the remand hearing was scheduled to occur on December 9, 2021. However, the remand hearing date was rescheduled to January 11, 2022 to accommodate the Department's witness(es)' availability. The hearing occurred via remote video conference at the request of the parties due to the Covid-19 pandemic. Following the January 11, 2022 hearing, the Department requested and was granted the ability to submit post-hearing briefs in lieu of closing arguments. Both parties filed post-hearing briefs consistent with the briefing schedule. The record in this matter includes: the pleadings; an audio recording of the January 11, 2022 hearing; a hearing transcript; Department Exhibits 1, 4-6, 8-10, and 12-15; Lamar Exhibits 101, 102, 105 and 107; and the parties' respective post-hearing briefs. ALJ Fredrick issued a Proposed Decision on Remand on April 7, 2022 reversing the Department's SROs.

On April 22, 2022 the Department filed objections to the Proposed Decision on Remand. Also on April 22, 2022, Lamar submitted a Brief in Support of Proposed Decision and correspondence commenting on the arguments raised by the Department's objections.

ISSUES TO BE DECIDED

The general issue in these matters remains whether the allegations set forth in the Department's sign removal orders are true and, if the allegations are true, whether they constitute a basis for the loss of the nonconforming status for the subject signs. More specifically, the issue is whether the addition of electrical lighting to existing nonconforming signs was a "substantial change" resulting in the loss of the signs' nonconforming status to justify the Department's sign removal orders.

FINDINGS OF FACT

The Administrator finds:

1. The Lamar Company, LLC, d/b/a Lamar Advertising of Janesville (Lamar) owns and controls an outdoor advertising sign erected in an area along Interstate Highway-39 (I-39), 1635 feet south of the Droning Road underpass in Dane County. The sign is identified as OASIS Number 14598 in the database of the Department of Transportation (Department). (Hearing testimony of Vicki Harkins)

2. Lamar owns and controls another outdoor advertising sign that was erected in the adjacent area along I-39, 2650 feet north of the Town Line Road underpass in Rock County identified in the Department's database as OASIS Number 14410. (Harkins hearing testimony)

3. Both signs identified as OASIS Number 14598 and OASIS Number 14410 (collectively "the signs") were lawfully erected and in existence prior to March 18, 1972. (Harkins hearing testimony, Tr. 23-24, 34-36; DOT Exhibit 8 (pp. 022-023); Lamar Exhibit 105 (pp. 021-022))

4. The signs became legally "nonconforming" as of March 18, 1972. (Harkins hearing testimony, Tr. 23 and 34-35)

5. The Department conducted inspections of the signs in March 1974. (Harkins hearing testimony, Tr. 25-28, 36-38; DOT Exhibits 8 (pp. 063 and 086) and 9 (p. 013))

6. At the time of the Department's March 1974 inspections, "sign inspection reports" were prepared that checked a box indicating that the signs had "illumination." The illumination was further identified in handwritten notation as "Scotch Lite" or

"Scotch Lite Letters." (Harkins hearing testimony, Tr. 25-28, 36-38; DOT Exhibits 8 (pp. 063 and 086) and 9 (p. 013))

7. The signs were not illuminated by electrical lighting in March 1974. (Harkins hearing testimony, Tr. 29 and 37)

8. DOT records related to the signs dating from the late 1970s to mid-1980s do not report evidence of illumination during those time periods. (Harkins hearing testimony, Tr. 30-31, 39-40; DOT Exhibit 8 (p. 067); Lamar Exhibit 105 (pp. 026 and 032))

9. Scotch Lite reflective lettering is a retroreflector that reflects light back to a light source. When Scotch Lite lettering is added to highway signs, vehicle headlights illuminate the reflective lettering making the sign more visible to the driver of the vehicle. (Hearing testimony of Dr. Mikhail Kats, Tr. 78, 98)

10. Scotch Lite lettering was removed from the signs and electrical lighting was added some time after March 1974. (Harkins hearing testimony, Tr. 26 and 37-43; DOT Exhibits 6 (p. 002) and 12 (p. 002))

11. The Department does not currently consider Scotch Lite reflective lettering to be a form of illumination. (Harkins hearing testimony, Tr. 29 and 39)

12. On May 27, 2016, the Department issued a sign removal order (SRO) for the sign identified by OASIS Number 14598. (Harkins hearing testimony, Tr. 32-33; DOT Exhibit 1)

13. On June 22, 2016, the Department issued a SRO for the sign identified by OASIS Number 14410. (Harkins hearing testimony, Tr. 43; DOT Exhibits 4 (pp. 152-156) and 9 (p. 016))

14. The SROs for both of the signs alleged the following:

> The sign is not substantially the same. Upon historical research, lighting was added to the structure sometime after 1974, which was after the sign became nonconforming on March 18, 1972. Such an addition constitutes a substantial change because the nonconforming use was extended to a 24 hour period, rather than confined only to daylight hours, rendering the sign illegal. Therefore, this sign has lost its nonconforming status and must be removed.

(Harkins hearing testimony, Tr. 32-33, 43; DOT Exs. 1 and 4 (p. 152))

15. On August 18, 2016 the Department amended SRO for OASIS Number 14598 to include a claim under 23 CFR § 750.105(a) and Wis. Admin. Code § Trans 201.10(3) ("Bonus Act" claim). The amended SRO stated "… the addition of electric illumination to a sign does not constitute repair, maintenance or a change in message, but rather, the addition of electric illumination rendered the sign illegal…" and further elaborated:

> At some point between 1987 and 2007, electrical lighting was added to the sign. The photos on the 1974 inspection report contain no electrical light fixture or power conduit, and the January 23, 1987 Sign Log excerpt indicates the sign associated with old permit no. 13-90-104 was not illuminated. By contrast, the 2007 and 2016 photographs contain evidence of the presence of electric lighting.

(Lamar Exhibit 101, p. 009)[1]

16. Lamar filed appeals and requests for hearing with regard to the SROs for both of the signs in these matters. (Lamar Exhibits 101 (pp. 022-024) and 102 (pp. 010-012)

17. Presently, the majority of Lamar signs illuminated by electricity are lit from dawn to midnight and then the electric lights are turned off at midnight. (Hearing testimony of Scott Best, Tr. 148, 159-160; Hearing testimony of Kim Simmons, Tr. 185)

18. Signs illuminated by reflective lettering are visible during nighttime hours to those motorists whose vehicle headlights are illuminating the reflective material and thus, visibility is not limited in time as compared to signs where electricity is turned off at midnight. (Best hearing testimony, Tr. 148, 153, 159; Kats hearing testimony, Tr. 112-116)

APPLICABLE LAW

The U.S. Department of Transportation, Federal Highway Administration (FHA) mandates that states enact and enforce laws to control the erection and maintenance of outdoor advertising signs along federal highways pursuant to 23 USC 131 (commonly referred to as the federal Highway Beautification Act of 1965). (DOT Ex. 8, pp. 97-101)

Consistent with 23 USC 131, the Wisconsin legislature enacted Wis. Stat. § 84.30 (the sign control law), which governs the Department's authority to regulate outdoor advertising

[1] The August 18, 2016 amended SRO was withdrawn as an issue in these matters pursuant to a Stipulation executed by the parties on May 27, 2020. (Lamar Exhibit 101, pp. 025-027)

signs adjacent to federal and interstate highways.[2] See *Vivid, Inc. v. Fiedler*, 219 Wis. 2d 764, ¶ 14, 580 N.W.2d 655 (1998). The stated legislative purpose of Wisconsin's sign control law is as follows:

> To promote the safety, convenience and enjoyment of public travel, to preserve the natural beauty of Wisconsin, to aid in the free flow of interstate commerce, to protect the public investment in highways, and to conform to the expressed intent of congress to control the erection and maintenance of outdoor advertising signs, displays and devices adjacent to the national system of interstate and defense highways, it is hereby declared to be necessary in the public interest to control the erection and maintenance of billboards and other outdoor advertising devices adjacent to said system of interstate and federal-aid primary highways and the Great River Road.

Wis. Stat. § 84.30(1)

Signs that were lawfully erected and in existence prior to the effective date of the sign control law were grandfathered under the law and allowed to remain on certain conditions despite not conforming to the requirements set forth under the law. Wis. Stat. § 84.30(5)(bm) As part of the Department's authority to "promulgate rules deemed necessary to implement and enforce" the sign control law, the Department has also enacted laws concerning when nonconforming signs must be removed. See Wis. Stat. § 84.30(5) and (14); see also, 23 CFR 750.707(5) (stating "[e]ach state shall develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights.") Consistent with 23 CFR 750.707(5) and Wis. Stat. § 84.30, the Department promulgated Wisconsin Administrative Code, Chapter Trans 201. Pursuant to Wis. Admin Code § Trans 201.10(2)(e), nonconforming signs can continue to exist as follows:

> (2) In order to lawfully maintain and continue a nonconforming sign, or a grandfathered sign under s. 84.30 (3)(d), Stats., the following conditions apply:
>
> . . .
>
> (e) The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Customary maintenance ceases and a substantial change occurs if repairs or maintenance, excluding message changes, on a sign exceeds 50% of the replacement costs of the sign.

[2] The signs at issue in these matters are located along I-39, which is an interstate federal highway within the definition found at Wis. Stat. § 84.30(2)(f).

"Substantially the same" is defined to mean "no substantial change has been made" to the signs. Wis. Stat. § 84.30(5)(br)1.g.[3] The statute sets forth examples of what may constitute a "substantial change" to a nonconforming sign including:

> Increasing the number of upright supports; changing the physical location; increasing the square footage or area of the sign face; adding changeable message capability; or adding illumination, either attached or unattached, to a sign that was previously not illuminated. "Substantial change" does not include customary maintenance.

Wis. Stat. § 84.30(5)(br)1.f.

As stated above, Wis. Stat. § 84.30 and Wis. Admin. Code chap. Trans 201 were created to comply with federal regulation that apply to controlled interstate highways (see Wis. Stat. §§ (1) and (16) and Wis. Admin. Code § Trans 201.01). Although not having the force of law, memoranda guidance issued by the FHA can be useful in interpreting and applying Wisconsin's sign control law to the facts in this matter when determining whether a substantial change has occurred. For example, in a memorandum dated February 1, 1983, which references the federal regulations governing nonconforming signs under 23 CFR 750.707, the FHA stated:

> It is well established that a conforming use cannot be enlarged. Enlargement relates not only to structural additions to a nonconforming use, but to the amount of intrusion by the use on its surroundings. It is this concept upon which Federal Regulation prohibiting the addition of illumination to nonconforming signs is based…One of the purposes of the Highway Beautification Act was to enhance scenic beauty along our Nation's highways. Outdoor advertising signs which were erected in protected areas became nonconforming because they were inconsistent with the law and further presented an intrusion on the scenic beauty of the area. These signs were therefore restricted to the condition in which they were at the time they became nonconforming. Unilluminated signs could be seen only during daylight hours. The addition of illumination would make them visible 24 hours a day, further increasing the amount of intrusion the signs have on the surrounding area. Therefore, the addition of illumination would be a substantial change to the sign.

(DOT Ex. 4, p. 157)

Similarly, in a memorandum dated September 1, 1995, the FHA stated:

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[3] At the time that the 2016 sign removal orders in these matters were issued, the phrase "[t]he sign must remain substantially the same" found in Wis. Admin Code § Trans 201.10(2)(e) was not further defined. 2017 Wisconsin Act 320 amended Wis. Stat. § 84.30 to include definitions for the phrases "Substantial change" and "Substantially the same" under Wis. Stat. § 84.30(5)(br). Neither party has asserted that these definitions should not apply in the analysis of the issues in these matters.

> We would consider that the addition of lighting, whether as a part of the structure or from a remote location if done for the purpose of lighting the sign would constitute a substantial change which should cause the sign to lose its nonconforming rights under State law. Generally, the addition of lighting results in a nonconforming use confined to daylight hours to be substantially extended, i.e. to a 24 hour period, which constitutes a substantial change.

(DOT Ex. 4, p. 91)

DISCUSSION

Pursuant to the Dane County Circuit Court's July 20, 2021 Decision and Order remanding this matter back to the Division of Hearings and Appeals, a hearing was held in these matters as necessary to afford the Department an opportunity to present evidence of a "substantial change" to the signs that are the subject of the Department's sign removal orders (SROs). The Department takes the position that a substantial change occurred when Lamar added electrical lighting to the signs sometime after 1974 resulting in the signs losing their legal nonconforming status. (DOT Exhibits 1 and 4 (p. 152)) According to the Department, the addition of electric lighting should be considered a substantial change under Wis. Stat. § 84.30(5) and Wis. Admin Code § Trans 201.10(2)(e). As set forth above, one example of substantial change under the statute includes the addition of "illumination, either attached or unattached, to a sign that was previously not illuminated." Wis. Stat. § 84.30(5)(br)1.f. These definitions are in line with the FHA's memorandum guidance that concludes the addition of illumination to a previously non-illuminated sign would amount to a substantial change to a nonconforming sign. (DOT Ex. 4 (pp. 91 and 157)) As recognized by the Circuit Court, a change in illumination is not the only way that a sign could be substantially changed. However, the burden of establishing whether a substantial change has occurred in these matters rests with the Department.

Part of the intent of the regulation of outdoor advertising signs along interstate and federal highways is to promote the safety, convenience and enjoyment of public travel and protect the natural beauty of the State. Wis. Stat. § 84.30(1) One way that purpose is achieved is by limiting the intrusiveness of billboards. (DOT Ex. 4 (pp. 91 and 157)) Intrusion may occur when an advertising structure is physically enlarged, so the sign takes up more of the sight field of motorists. See Wis. Stat. § 84.30(5)(br)1.f. (stating a substantial change includes "…increasing the square footage or area of the sign face") and Wis. Admin. Code § Trans 201.10(2)(e) ("The sign…may not be enlarged.") But intrusion can also result from extending the time that the sign is visible by adding illumination to a previously non-illuminated sign. Wis. Stat. § 84.30(5)(br)1.f. The Department's SROs are premised upon the contention that the addition of electric lighting "constitutes a substantial change [to the nonconforming signs] because the nonconforming use was extended to a 24-hour period, rather than confined to daylight hours." (DOT Ex. 1)

The Department presented testimony from a current DOT employee, Vicki Harkins, who has been employed as the Department's "Outdoor Advertising Program Lead" since 2018. (Testimony of Vicki Harkins) Ms. Harkins testified with respect to her knowledge and understanding of the Department's current policies on how signs along the State's highways may lose their legal, non-conforming status thereby requiring their removal. (Id. Tr. 20-22) Ms. Harkins also testified with regard to numerous records concerning the signs at issue in this matter. (Harkins hearing testimony; DOT Exs. 4, 8 and 9) Because Ms. Harkins did not work at the Department prior to August 2018, she was not personally involved in the creation of any of the records relevant in this matter, she had not spoken to any of the individuals who prepared the documents, she could not explain why certain information was contained in some of the records, and she did not know why some Department records related to the signs were missing. (Harkins hearing testimony, Tr. 48-52) Moreover, prior to joining the Department in 2018, Ms. Harkins had no experience with or personal knowledge of outdoor advertising signs, she was not familiar with the Department's prior policies, and specifically, she did not have knowledge of whether the Department had previously considered Scotch Lite lettering a form of illumination. (Id. Tr. 47-48, 56) Regardless, Ms. Harkins testified that the Department currently does not consider Scotch Lite reflective lettering to be a form of illumination. (Id., Tr. 29 and 39)

It is undisputed that the signs at issue in this case were erected some time prior to 1972. (Harkins testimony, Tr. 24, 35; DOT Ex. 4) Moreover, it is undisputed that the signs at issue were affixed with Scotch Lite lettering but no electrical lights as of March 1974. (Harkins hearing testimony, Tr. 29 and 37; DOT Exs. 8 and 9) Ms. Harkins testified that the Department considers the nonconforming signs in this matter illegal because electrical lights had been added to them at some point. (Harkins testimony, Tr. 43) According to the Department's own records, in a 1974 sign inspection report the Department identified the signs at issue as having illumination in the form of Scotch Lite lettering. (Id.; DOT Exs. 4 (pp. 087-088, 143-144, 146-147), and 8 (pp. 014-015, 063-064, 086-087, 104-105)) However, subsequent Department records from the late 1970s and mid-1980s reflect that the signs were not illuminated. (Harkins hearing testimony, Tr. 30-31, 39-40; DOT Ex. 8 (p. 67); Lamar Ex. 105 (pp. 26 and 32)) Although it is unknown exactly when electrical lighting was added to the signs, Department records and pictures reflect the existence of electrical lighting equipment as of 2007 for OASIS 14410 and as of April 2016 for OASIS 14598. (Harkins hearing testimony, Tr. 33-34, 40-42; DOT Exhibits 8 (p. 57) and 10 (p. 9))

The Department also presented expert testimony from Dr. Mikhail Kats, an associate professor in the Department of Electrical and Computer Engineering at the University of Wisconsin-Madison. Dr. Kats testified as to the differences between active light sources and reflective sheeting. (Kats hearing testimony, Tr. 73-78, 97-103) For example, as explained by Dr. Kats, reflective sheeting such as Scotch Lite is not a source of light but a retroreflector that relies upon an external light source to reflect light back to the source in order to illuminate an object; whereas electrical lighting is an active light source that converts energy into light to directly illuminate an object. (Id. at Tr. 109-110) The Department presented a demonstration by Dr. Kats using a flashlight to illuminate a sheet of paper as compared to reflective sheeting in a darkened

room. (Id., Tr. 85-96; DOT Ex. 15)[4] According to Dr. Kats' testimony, in order for a sign to be visible to a person, it must be illuminated in some way, whether by a light source, including the sun, electrical lighting, or by headlights illuminating reflective sheeting on the sign. (Id. Tr. 112-114) Dr. Kats testified that "the purpose of the retroreflector is to make the object more visible…" (Id. Tr. 116-117) Further, Dr. Kats testified that "as long as the headlights are illuminating the piece of Scotch Lite, it should be quite visible to the motorist…" (Id. Tr. 98, 113) However, an electrically lit sign would obviously be visible irrespective of whether lights from a vehicle's headlights are directed toward the sign. (Id. Tr. 124)

Although Dr. Kats testified as to how reflective sheeting and electric lights are different, he did not testify that Scotch Lite lettering is not a form of illumination. Regardless of their differences, the evidence and testimony supports the conclusion that both electrical lighting and Scotch Lite reflective lettering result in the signs being illuminated. "Illuminate" is defined as "to give light to, light up." (Webster's New World Dictionary). Signs with reflective Scotch Lite lettering are illuminated by the headlights of passing motor vehicles. In other words, the addition of the Scotch Lite reflective material to the signs caused the signs in this matter to "light up" when struck by headlights. The use of this form of illumination is confirmed by the Department's inventory sheet for the subject signs, which checked the box "Yes" for the signs having illumination and the words "Scotch Lite" and "Scotch Lite Letters" describing the form of illumination. (Harkins' hearing testimony, Tr. 43; DOT Exs. 4 (pp. 087-088, 143-144, 146-147), and 8 (pp. 014-015, 063-064, 086-087, 104-105) As stated above, the Department's own expert further described the Scotch Lite reflective lettering as being illuminated by an external source such as vehicle headlights. (Kats hearing testimony, Tr. 98, 113) Consistent with the testimony and evidence presented at the hearing, it is reasonable to conclude that the addition of Scotch Lite reflective lettering provided a form of illumination to the signs at issue.

The Department's post-hearing briefs largely focus on highlighting the inherent and scientific differences between Scotch Lite reflective material and electrical lighting. However, the Department misstates the focus on remand. The Circuit Court did not remand these matters to the DHA in order to merely establish a *difference* between Scotch Lite reflective material and electric lighting. (Department Reply brief, p. 3) Rather, on remand the Department was afforded an opportunity to present evidence to establish a "substantial change" under Wis. Stat. § 84.30(5)(br)1.f. that justified the termination of the signs' legal nonconforming status and ordered removal. The fact that the sources of the respective signs' illumination were different is not equivalent to changing an unilluminated sign into an illuminated one, however. Based upon the evidence and testimony described above, the signs at issue were illuminated as a result of the adding of Scotch Lite lettering and later, illuminated by the adding of external electrical lighting. The Department has failed to present convincing evidence that the change in the source of the illumination amounted to a substantial change under the law.

[4] The Department's demonstration by Dr. Kat's used DOT Exhibit 15 as an example of reflective material. However, there was no testimony or evidence establishing that DOT Ex. 15 consisted of 3M Scotch Lite reflective material similar to the lettering used on the signs at issue. Moreover, the efficacy of the demonstration was also limited due, at least in part, to the nature of the remote video hearing because the computer(s) in the room created additional light sources resulting in the constant illumination of the reflective material regardless of whether the flashlight was pointed at the reflective material.

Moreover, the Department did not present any evidence that the upgrade from reflective Scotch Lite reflective lettering to the use of electrical lighting extended the visibility of the signs in this matter to a 24-hour period rather than confined to daylight hours as alleged in the SROs. On the contrary, the evidence and testimony established that the signs with Scotch Lite reflective lettering would have been capable of being visible to motorists 24 hours per day as long as the motorist's headlights illuminated the reflective lettering. No evidence was introduced that the signs at issue in this matter were ever illuminated with electricity twenty-four hours per day. According to testimony presented by Lamar's representatives, the majority of Lamar controlled signs that are illuminated by electricity are typically not visible 24 hours per day because the electricity is turned off at midnight except in a very small percentage of cases where the customer pays for the cost of the electricity. (Best hearing testimony, Tr. 159-160; Hearing testimony of Kim Simmons, Tr.185-186)

Not only is there insufficient proof that the visibility of the signs at issue in these matters were previously "confined to daylight hours" but there is insufficient proof that the visibility was "substantially extended, i.e. to a 24 hour period" by the addition of electrical lighting as the Department's SROs alleged. Further, the Department has failed to establish that the addition of electrical lighting some point after 1974 increased "the amount of intrusion the signs have on the surrounding area" or that it negatively impacted the natural beauty, safety, convenience and enjoyment of public travel, free flow of intrastate commerce, or public investment in highways. See Wis. Stat. § 84.30(1). Thus, according to the provisions of the sign control law, along with the guidance issued by the FHA, there is insufficient evidence or testimony that the signs became more intrusive to support a finding of a substantial change.

Finally, Lamar argues that the Department's change in interpretation of whether Scotch Lite is a form of illumination requires the Department to first engage in rulemaking under Wis. Stat. § 227.10(1) citing *Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, 389 Wis. 2d 486, 936 N.W.2d 573. The Department asserts that this argument is a "red herring" as there was no evidence presented of a prior policy by the Department. (Dept. Reply Brief, p. 6) Because the Department has failed to set forth a substantial change, it is unnecessary to address this argument.

Based upon the evidence presented at the remanded hearing in this matter, the ALJ's determination remained that the Department failed to establish that the signs at issue in this matter underwent a substantial change resulting in the loss of their legal, nonconforming status. The undersigned Administrator agrees, and the Department's objections to the Proposed Decision on Remand do not compel a different outcome.

The Department's objections raised two arguments: (1) that there is no evidence of whether the signs were illuminated on March 18, 1972 when Wis. Stat. § 84.30 was adopted as law; and (2) that the proposed decision incorrectly decided that Scotch Lite is a form of illumination under Wis. Stat. § 84.30. In reply to the objections, Lamar asserts that the Department has waived its argument as not previously raised. In addition, Lamar asserts that there is no evidence that the signs did NOT have Scotch Lite lettering as of March 1972 and that the best evidence of what existed at that time is identified in the Department's 1974 records.

As to the first objection, the Department argues that based upon the evidence submitted, there is no evidence that the signs at issue were illuminated as of March 18, 1972, which is when they became legally non-conforming under Wis. Stat. § 84.30. As acknowledged by the Department, throughout the entirety of these present cases, the parties have operated on the assumption "that the signs bore Scotch Lite as of March 18, 1972, the date the signs became nonconforming." (Department Objection to Proposed Decision, p. 3) The Department points out that its own records only document Scotch Lite lettering on the signs at issue as of March 1974. The Department did not submit documentation of the signs' respective illumination (or lack thereof) as of March 18, 1972. Based upon that discrepant two-year gap, the Department now suggests for the first time in nearly six years of litigation that if Scotch Lite lettering is considered illumination, then DHA must find that a substantial change occurred as of March 1974.

However, as acknowledged by the Department, the SRO orders issued in these matters were based only upon the Department's claim that the addition of electric lights constituted a substantial change. The Department either was unable or failed to present evidence of the signs' physical condition as of March 18, 1972. Because the burden in these matters falls on the Department, it would be fundamental that in order to prove a substantial change has occurred, the Department must first be able to establish the condition of the signs prior to the change. As set forth in the Proposed Decision on Remand, in order for the addition of electrical lights to amount to a substantial change, it would have been incumbent upon the Department to establish that the signs at issue were not previously illuminated. See Wis. Stat. § 84.30(5)(br)1.f. The same would be true if the Department's SROs had asserted that the addition of Scotch Lite lettering in 1974 amounted to a substantial change. By its argument, the Department admits that it has no evidence of if/how the signs were illuminated on March 18, 1972. A lack of evidence does not absolve the Department of its burden to prove its case; rather, the lack of evidence supports reversal of the SROs in these matters. Further, I agree with Lamar that the Department has waived such an argument having never raised it in the original or amended SROs, or throughout the parties' extensive prehearing discovery from 2016-2021, through extensive motion briefing, on appeal to the circuit court, at the January 2022 remand hearing, or in the parties' post-remand-hearing briefs.

As for the Department's second objection to the Proposed Decision on Remand, it asserts that a conclusion that Scotch Lite is a form of illumination under Wis. Stat. § 84.30 nullifies the purpose and intent of the statute because it could lead to arguments that every sign, including signs merely illuminated by the sun or vehicle headlights, can be considered previously illuminated. The Department's argument is without merit. The Legislative purpose of the sign control law is explicitly set forth under Wis. Stat. § 84.30(1). The Department makes no connection to, let alone an argument as to how, a determination that Scotch Lite is a form of illumination would nullify the purposes set forth under Wis. Stat. § 84.30(1). Moreover, the Department fails to present any support for the assertion that the Wisconsin Legislature only intended that external electrical lighting be considered "illumination." (Department objections, p. 6) The plain and unambiguous wording of Wis. Stat. § 84.30(5)(br)1.f. anticipates that a substantial change to a sign may include the *addition* of illumination, either attached or unattached. In the present matters, Scotch Lite was affixed to the signs and then later, electric

lights added. The evidence submitted at the hearing, including the testimony of the Department's own expert witness, supports the conclusion that both Scotch Lite and electric lights provided illumination to the signs. Although the sun and vehicle headlights may illuminate a sign that does not have Scotch Lite or electric lights, neither the sun nor vehicle headlights are arguably *added* to a sign. Thus, because the signs at issue in these matters were previously illuminated by Scotch Lite, the addition of electric lights would not necessarily be a substantial change under Wis. Stat. § 84.30(5)(br)1.f.

The Proposed Decision on Remand has been amended in order to further clarify the statute's use of the phrase "…adding illumination…" (Finding of Fact, ¶ 9 has been revised to state "When Scotch Lite lettering is added to highway signs, vehicle headlights illuminate the reflective lettering making the sign more visible to the driver of the vehicle.") In addition, correction to legal and statutory cites have been made. In all other respects, the Proposed Decision on Remand is adopted as the final decision in these matters.

CONCLUSIONS OF LAW

The Administrator finds:

1. The signs (OASIS Number 14598 and OASIS Number 14410) were erected and existed prior to March 18, 1972 and were thus nonconforming under Wis. Stat. § 84.30(5).

2. The signs (OASIS Number 14598 and OASIS Number 14410) were previously illuminated by reflective Scotch Lite lettering as of March 1974.

3. The Department has failed to present sufficient evidence to establish that the addition of electrical lighting to the signs in these matters extended the nonconforming use of the signs to a 24 hour period as alleged in the Sign Removal Orders.

4. The modification of the method of illuminating the nonconforming signs in these matters from Scotch Lite lettering to electrical lighting did not amount to a "substantial change" under Wis. Admin. Code § Trans 201.10(2)(e).

5. The Department has failed to establish that the allegations in the Sign Removal Orders in these matters constitute a basis for the loss of the nonconforming status for the subject signs under Wis. Stat. § 84.30 and/or Wis. Admin. Code § Trans 201.

6. The Division of Hearings and Appeals has authority to issue the following orders pursuant to Wis. Stat. §§ 84.30(18) and 227.43(1)(bg).

ORDERS

The Administrator finds:

1. For the reasons stated above, the sign removal order dated on May 27, 2016, and amended on August 18, 2016, issued by the Wisconsin Department of Transportation to Lamar Company, LLC, d/b/a Lamar Advertising of Janesville, for a sign located along I-39 in Dane County and identified as OASIS Number 14598 is REVERSED.

2. For the reasons stated above, the sign removal order dated June 22, 2016, issued by the Wisconsin Department of Transportation to Lamar Company, LLC, d/b/a Lamar Advertising of Janesville, for a sign located along I-39 in Rock County and identified as OASIS Number 14410 is REVERSED.

Dated at Madison, Wisconsin on May 11, 2022.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705
Telephone:(608) 266-7709
FAX:(608) 264-9885

By: _____
Brian Hayes
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.